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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. [redacted] 3

THE SCHRIBER-SCHROTH COMPANY, Petitioner,

vs.

THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.

No. [redacted] 4

THE ABERDEEN MOTOR SUPPLY COMPANY, Petitioner,

vs.

THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.

No. [redacted] 5

THE F. E. ROWE SALES COMPANY, Petitioner,

vs.

THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.

PETITION FOR REHEARING

Of a Petition for Writs of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

THOMAS G. HAIGHT,
GEORGE L. WILKINSON,
JOHN H. BRUNINGA,
JOHN H. SUTHERLAND,
Attorneys for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

LIST OF AUTHORITIES CITED.

Cases.

Miscellaneous.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 674.

THE SCHRIBER-SCHROTH COMPANY, Petitioner,

vs.

THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.

No. 675.

THE ABERDEEN MOTOR SUPPLY COMPANY, Petitioner,

vs.

THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.

No. 676.

THE F. E. ROWE SALES COMPANY, Petitioner,

vs.

THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.

PETITION FOR REHEARING

Of a Petition for Writs of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

To the Honorable The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondent brought suit against Petitioners, alleging infringement of five patents relating to pistons for internal combustion engines. The District Court held all the patents invalid and further held that the accused device (Ex-

hibit 1) employed "the essential structure, function and mode of operation of the prior art" (Rec. p. 1105), confirming the report of a Special Master before whom the case had been tried. The Court of Appeals for the Sixth Circuit held two* of the five patents to be valid, and to have been infringed by the Exhibit 1 piston, reversing the decree of the District Court as to those two patents, and ordering that the Bill be dismissed **without prejudice** as to the remaining three patents.

On February 14 last, this Court denied Petition for Writs of Certiorari.

There is no conflict of decisions, as between different Circuits, on the question of validity of these patents. However, due to the peculiar situation of the automotive industry, there is only the remotest possibility that any other Circuit Court of Appeals will ever be afforded an opportunity to pass upon the validity of these patents.

Since the denial of the Writs in these cases there has been published in the "Automotive Industry" of February 26, 1938, certain data with reference to the manufacture of automobiles which unmistakably shows that, through the decision of the Circuit Court of Appeals for the Sixth Circuit in these cases, Respondent has established the validity of its patents against 94.67% of the automotive industry. These circumstances, it is thought, should take the case outside the general rule requiring a conflict of decisions as a prerequisite to the grant of a Writ of Certiorari in patent cases, and we respectfully suggest that in view of the existence of such a situation this Court, in the interest of justice, should not refuse to review these cases at this time, unless it is satisfied of the soundness of the decision of the Circuit Court of Appeals

*Gulick 1,815,733.
Maynard 1,655,968.

on the question of validity of the Gulick and Maynard patents.

I.

In "Automotive Industry," a recognized trade paper, there was published, on February 26, 1938, data showing the sales of automobiles by the various manufacturers in the period 1929 to 1937. From the published data the following condensed summary may be made:

Manufacturers Within the Sixth Circuit.		Manufacturers Without the Sixth Circuit.	
General Motors	8,787,556	Auburn	94,783
Chrysler	4,170,813	Austin	12,045
Ford	6,399,757	De Vaux	6,166
Continental	4,263	Durant	77,519
Graham	192,077	Franklin	25,585
Hudson	810,155	Marmon	41,830
Hupmobile	119,563	Nash	399,535
Packard	317,563	Studebaker	482,941
Reo	54,018	Miscl.	58,542
Willys	439,026		
Total	21,294,814	Total	1,198,946

Of the manufacturers without the Sixth Circuit but two, Studebaker and Nash, remain in the business today. During the month of February, 1938, Studebaker and Nash together produced but 2.61 per cent* of the automobiles manufactured in this country. As a practical matter, through the expedient of suing their dealers or otherwise,

*"Automotive Daily News," Detroit, Michigan, March 3, 1938, Vol 13, No. 2489. This publication as well as the "Automotive Industry" of February 26, 1938, are called to the attention of the Court in accordance with precedent (Brinkerhoff-Faris Co. v. Hill, 280 U. S. 550, 281 U. S. 673; Olmstead v. United States, 276 U. S. 609, 277 U. S. 438; St. Louis Union Trust Co. v. Mellon, 231 U. S. 648, 241 U. S. 657, 242 U. S. 666; Helvering v. Northern Coal Co., 290 U. S. 59; Sanitary Co. v. Winters, 278 U. S. 587, 280 U. S. 30, 34; Paramount Publix Corp. v. American Triergon Corp., 294 U. S. 464).

even these two nonresident automobile manufacturers may, in effect, be subjected to the jurisdiction of the Sixth Circuit Court of Appeals, as indeed they have been in the past (Reeke-Nash Motors Co. v. Swan Carburetor Co., 88 Fed. [2d] 876; Gear Grinding Company v. Studebaker Company, 270 Fed. 93).

II.

Having such complete jurisdiction of the automobile manufacturers, the decision of the Sixth Circuit Court of Appeals will be the last word upon the validity of the Gulick and Maynard patents, unless this Court intercedes. The automobile manufacturers use and sell the pistons and hence are chargeable with infringement, notwithstanding that the piston may have been fabricated without the Sixth Circuit.

It is not reasonable to expect that Respondent will go outside of the Sixth Circuit to sue a piston manufacturer when it can cut off the piston manufacturer's outlet by bringing suit against the automobile manufacturers within the Sixth Circuit, where the patents have been sustained as valid. Respondent declined an invitation (Rec. p. 22) to bring suit against the manufacturer (an inhabitant of the Eighth Circuit) of the piston accused in these cases.

Respondent has maneuvered so as to be in a position such that if it won in the Sixth Circuit, it would have practically all the relief it was entitled to, and could rely upon this Court's rule, with reference to the necessity of conflict of decisions, to avoid a review of the validity of its patents by this Court, but, in the event that it lost in the Sixth Circuit, it could still sue elsewhere. Respondent thus had "two bites at a legal cherry," but the piston manufacturers and the automobile manufacturers have no such alternative to fall back upon. The piston manufac-

turers and the automobile industry have no such opportunity, in a subsequent suit, to establish a conflict of decisions.

Under the circumstances shown, we submit, the general rule of this Court, that a conflict of decisions is prerequisite to a review of patent cases, works a hardship upon the manufacturing industry, but offers an advantage to Respondent.

In our Petition for Writs of Certiorari we contended, correctly, we think, that the decision of the Sixth Circuit Court of Appeals was in discord with various decisions of this Court. It is deemed unnecessary to repeat here, except to pray the Court to re-examine the points brought out by the Petition, and that, unless the Court is satisfied of the soundness of the decision below, to grant the Writs.

Wherefore, it is prayed that the Petition for Writs of Certiorari in the above-entitled causes be re-examined and reconsidered with the view that, if the Court deems the decision of the Circuit Court of Appeals on the issues of validity to be unsound in any respect, the Writs be granted.

Respectfully submitted,

THOMAS G. HAIGHT,
GEORGE L. WILKINSON,
JOHN H. BRUNINGA,
JOHN H. SUTHERLAND,
Attorneys for Petitioners.

March 7, 1938.

I hereby certify that the foregoing Petition for Rehearing is filed in good faith and not for the purpose of delay.

John H. Bruninga.